

August 15, 2013

Mayor Ken Brown  
City of Sonoma  
164 West Napa Street  
Sonoma, CA 95476

Re: Your Request for Informal Assistance  
**Our File No. I-13-102**

Dear Mr. Brown:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> We are providing informal assistance because you are not making, participating in making, or influencing a governmental decision.<sup>2</sup> If, however, you are called upon to participate in governmental decisions that arise in the future that relate to your employment, you might have a disqualifying conflict of interest that would prevent you from participating in the decision, as discussed below.

### QUESTION

Does the Act prohibit you from (i) selling ads or (ii) collecting debts for your employer, a non-profit radio station, where you would be paid a commission on ads you sell and debts you collect?

### CONCLUSION

No. You are not prohibited from selling ads for a commission or collecting debts for a percentage of the debts you collect. However, your commission received is income and the source of that income is determined under Regulation 18703.3 (c)(2)(F), (copy enclosed).

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3).)

Therefore, you will have a reportable source of income in any person from whom you received \$500 or more in a calendar year, and you are prohibited from participating in any decision that materially financially affects a source of income from which you have received \$500 within the 12 months preceding the decision.

### FACTS

You are the mayor of the City of Sonoma and are employed as an independent contractor by a non-profit radio station (the “Station”). Your current duties include selling ads, for which you are paid a commission. Your employer has suggested that you also handle debt collection, and you would be paid a percentage of the amount you collect. The city does not purchase ads from the Station or conduct any other business with the Station. From time to time, members of the city’s staff are invited as guests on the Station’s programs. The Station does not pay staff or the city for these appearances nor does the city pay the Station for these appearances. In addition, program hosts sometimes recap and discuss city council meetings. The city does not pay the Station for airing these discussions. You state that there are no pending city council decisions involving the Station or any of the persons to whom you sell advertisements or from whom you will be collecting debts.

### ANALYSIS

While, you are not prohibited from collecting a commission for the ads you sell or being paid a percentage of the debts you collect, these payments will subject you to certain reporting requirements on your annual statement of economic interests as well as the Act’s conflict-of-interest provisions with respect to any source of income you may acquire as a result of these activities, as discussed below.

The Act’s conflict-of-interest provisions ensure that public officials will “perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a *governmental decision* in which the official has a financial interest.

You state that there are no pending city council decisions involving the Station or any of the persons to whom you sell advertisements or from whom you will be collecting debts. Therefore, you are not making, participating in making, or influencing a governmental decision that may have a reasonably foreseeable material financial effect on any source of income to you. However, if you are called upon to participate in governmental decisions that arise in the future that relate to your employer, you might have a disqualifying conflict of interest that would prevent you from participating in the decision. Therefore, we provide the following information regarding the Commission’s eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest.

**Steps 1 & 2. Are you a “public official” within the meaning of Section 87100 and will you be making, participating in making or influencing a governmental decision?**

As a city council member, you are a public official under the Act. (Sections 87200 and 82048.) When voting on or participating in city council decisions involving your employer, you will be making, participating in making, or otherwise using your official position to influence a governmental decision.<sup>3</sup>

**Step 3. Do you have an interest in the decisions at issue?**

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or any one of five enumerated interests described in Section 87103 and Regulations 18703-18703.5.

- An interest in a business entity in which he or she has a direct or indirect investment of \$ 2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- An interest in real property in which he or she has a direct or indirect interest of \$ 2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An interest in any source of income, including promised income, aggregating \$ 500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An interest in any source of gifts to him or her if the gifts aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An interest in his or her personal finances, including those of his or her immediate family -- this is the ‘personal financial effects’ rule. (Section 87103; Regulation 18703.5.)

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<sup>3</sup> When a public official who holds an office specified in section 87200 has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5(c) and 18702.5(d) apply.

You have an interest in your employer as a source of income to you as to (a) your salary, (b) the payments you receive for collecting debts and (c) the commissions you earn for selling advertisements.

With respect to the commissions for selling advertisements, Regulation 18703.3 (c)(1) provides that commission income is a payment received by a public official, as a result of services rendered as a broker, agent, "or other salesperson." Regulation 18703.3(c)(2)(F) provides that both the person whose products or services the salesperson is selling and the person who purchases the products or services are sources of income.

As a retail salesperson, in addition to your employer, you have a source of income interest in any person who purchases services from your employer on which you are paid commission income. (See Regulation 18703.3(c)(2)(F).) For purposes of determining the amount of the income, the full gross value of any commission income for a specific sale or similar transaction shall be attributed to both your employer and the purchaser in that sale or transaction. (Regulation 18703.3(c)(3).) Thus, for each advertiser you sign up and for which you receive a commission of \$500 or more, that advertiser is considered a potentially disqualifying source of income to you.

Please note that the compensation you receive for the debts you collect is treated as income from your employer, but not "commission income." Accordingly, the debtors from whom you collect debt are not considered separate sources of income to you.

Because you have not provided any facts relating to any other potential interest other than your potential sources of income, our analysis is limited to this interest.

**Steps 4 and 5. Will your source of income be directly or indirectly involved in a decision and what is a material affect?**

Different materiality standards apply depending upon the source of incomes involvement in the decision. If the source of income is directly involved, any financial affect is material, even one penny.

Under Regulation 18704.1(a), a source of income, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

"(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

"(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license,

permit, or other entitlement to, or contract with, the subject person.”

If the source of income is not directly involved in a governmental decision, it is indirectly involved. (Regulation 18704(a).) The materiality standards for indirectly involved sources of income vary depending upon whether the source of income is a business entity, a non-profit entity, or an individual. For business entities and non-profit entities, the standard also varies depending on the size of the entity. These standards are set forth in Regulation 18705.3. Because you have neither specific governmental decision before you nor a specific source of income related to that decision, we are unable to provide any further guidance of the application of the property materiality standard.

**Step 6. Is it reasonably foreseeable that the financial effect of the governmental decision on your interests will meet the applicable materiality standards?**

Once a public official has determined the materiality standard applicable to each of his or her interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A financial effect need not be certain, or even substantially likely, to be reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra.*)

**Step 7. Despite a determination that you have a potential conflict of interest, may you participate in a decision because the financial effect on your interest is not distinguishable from its effect on the public generally?**

A public official who determines that his or her interest will experience a material financial effect as a result of a governmental decision may nevertheless participate in the decision if the financial effect on his or her interest is not distinguishable from its effect on the public generally. (Section 87103, Regulation 18707.) Under the basic rule provided in Regulation 18707.1, if a “*significant segment*” of the jurisdiction is affected by the governmental decision in *substantially the same manner* as it would affect the official’s interests, then the official may participate in the decision. Accordingly, in order to apply the “public generally” exception, an official must meet both parts of this two-part test—the decision must affect a significant segment of the jurisdiction and the significant segment must be affected in substantially the same manner as the official’s interest.

Determining whether the “public generally” exception applies to a conflict of interest involves a complex analysis based on specific and detailed facts. We therefore suggest that if you believe the exception applies to any future decisions, you seek assistance from the city attorney.

**Step 8. If you have a conflict of interest in a decision, may you nevertheless participate because your participation is legally required?**

Section 87101 (Regulation 18708) provides an exception under which a public official who has a conflict of interest in a governmental decision may nevertheless participate when the official's participation is legally required. For instance if so many of the council members are disqualified from participating that there are not enough eligible to make a decision, this exception may be invoked. The rule does not apply when there is an alternative source of decision-making consistent with the statute authorizing the decision. (Regulation 18708.) Thus, it only applies when it is legally impossible for the decision to be made without the participation of the disqualified official and does not apply when the disqualified official's vote is merely needed to break a tie or when a quorum can be convened of other members of the city council who are not disqualified, whether or not such other members are actually present at the time of the disqualification.

To further assist you with identifying potential conflicts of interest, we enclose the Commission's pamphlet entitled "Can I Vote? Conflicts of Interest Overview."

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Valentina Joyce  
Counsel, Legal Division

VJ:jgl

# LEGAL DIVISION ASSIGNMENT SHEET

Tracking Number:	13105
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ITEM DESCRIPTION			
Advice Letter No.	13-102	Requestor	Brown, Ken
Regulation Project No.			
Other (describe)			

Received By FPPC On:	06/25/13	Due Date:	07/25/13
Assigned To:	Val	Date To Assignee:	07/17/13

REVIEWERS	Date To Review	1st Approval & Date (Including Regulation Notices)	Date To Review	Final Approval & Date (Incl. Regulation Adoption Memos)
Proofed				
Senior		WJL		
TAD Chief (SEI, Campaign, Conflict of Interest Code letters)				
Assistant GC		JWW		
General Counsel				
Executive Director (discretion of GC)				
Chair (discretion of GC)				